

1 to integration credit because it's not 20 hours a week.

2 JUDGE LUTON: Whatever it says, if it doesn't meet
3 the criteria for part-time integration, it simply doesn't meet
4 it.

5 MR. BERFIELD: That's correct, Your Honor.

6 JUDGE LUTON: No matter -- the attempt might be made
7 to gain some credit for it. You want to know what purpose --
8 is it, indeed, being offered in an effort to garner some
9 integration credit?

10 MR. BERFIELD: Well, I think that might be a helpful
11 clarification of counsel. As I say, I haven't -- I just don't
12 want its admission to be a ruling in effect that they're going
13 to get integration credit for it. That's what I'm trying to
14 preserve.

15 MR. KRAUS: Your Honor, may I speak directly?

16 JUDGE LUTON: Sure.

17 MR. KRAUS: Obviously we would not insist on the
18 position that Allegheny has to agree now that EZ gets
19 integration credit in order for this exhibit to be admitted.
20 Our position is, is very simple on this. We understand what
21 the Commission's traditional criteria have been for
22 integration credit. We think the integration criteria are, in
23 fact, in a state of flux at the present time and we think that
24 in this case in particular, this kind of case, where a new
25 applicant files against an existing licensee, that the

1 existing licensee is entitled to attempt to claim that the
2 structure which it has is the functional equivalent of the
3 kind of traditional integration credit which has been given to
4 applicants under the current criteria. And we understand that
5 that is not a simple argument. We understand that that is not
6 one which Allegheny is going to embrace, although they
7 themselves are at least putting forward a suggestion that one
8 of their principles will be doing work at less than 20 hours a
9 week.

10 JUDGE LUTON: And to the extent that the Commission
11 recognizes such a thing, then --

12 MR. KRAUS: Partial.

13 JUDGE LUTON: -- Allegheny will claim credit.

14 MR. KRAUS: Exactly. I mean, we will -- we'll be
15 arguing not obviously for full integration credit, but for
16 some kind of partial and this allows us to make the argument
17 which may or may not be acceptable.

18 JUDGE LUTON: Well, with that explanation do you
19 have an objection with respect to admissibility, Mr. Berfield.

20 MR. BERFIELD: No, Your Honor.

21 JUDGE LUTON: All right. Obviously today we're not
22 making judgments about whether integration credit is going to
23 be given. The parties are laying groundwork to make their
24 various claims later on. 8 is received.

25 (The document that was previously

1 marked as EZ Exhibit No. 8 was
2 received into evidence.)

3 JUDGE LUTON: 9, Mr. Box.

4 MR. BERFIELD: I would assume 9 is being offered in
5 the same spirit and for the same purpose as Exhibit 8 --

6 MR. MILLER: Exactly.

7 MR. BERFIELD: -- so, in view of that and with the,
8 the fact that we'll rule those facts out later on, who gets
9 integration credit, who doesn't, why I would have no
10 objection.

11 JUDGE LUTON: Mr. Box makes it clear that
12 integration is what's sought here. Mr. Kellar stops somewhat
13 short of an explicit statement, but it's explicit enough.
14 Now, any objection by the Bureau?

15 MR. ZAUNER: No, Your Honor.

16 JUDGE LUTON: All right. Integration statement,
17 that's received.

18 (The document that was previously
19 marked as EZ Exhibit No. 9 was
20 received into evidence.)

21 JUDGE LUTON: Now No. 10.

22 MR. BERFIELD: Now we -- it was actually there for
23 you.

24 JUDGE LUTON: Okay. Mr. Meyer tells us about his
25 experience and integration.

1 MR. BERFIELD: I have no objection to Exhibit 10.

2 JUDGE LUTON: No objection, Bureau? The Bureau
3 doesn't worry about that. 10 is received.

4 (The document that was previously
5 marked as EZ Exhibit No. 10 was
6 received into evidence.)

7 JUDGE LUTON: Okay. This is a station which is
8 about to be acquired WQKB, the statement of Alan Box. Any
9 objection?

10 MR. BERFIELD: Yes, Your Honor. I object to -- I
11 guess paragraphs 3, 4 and 5 of this exhibit. Exhibit 3
12 contains assertions as to engineering and alleged efficiency
13 of coverage, but we don't have any, you know, any engineering
14 showing here, nor do we have any statement of engineering
15 qualifications on the part of Mr. Box, so I don't believe that
16 he would be competent to, to make those assertions that are
17 contained in paragraph 3 as to engineering. And paragraph 4,
18 again he's stating based on his understanding we have no --
19 that the station has not been profitable. I'm not sure what
20 the relevance of this is, but I think there's also a question
21 of his competence to testify to that. And then the same
22 objection would hold with respect which is the summary in
23 paragraph 5.

24 JUDGE LUTON: Okay. Heard all those objections.
25 Let me just ask as you respond tell me what the purpose of

1 | this offering is also --

2 | MR. MILLER: Yes, sir.

3 | JUDGE LUTON: -- as you address those objections?

4 | MR. KRAUS: The purpose of this offering is to
5 | address the problem that is created by the Commission's
6 | revised multiple ownership rules, the problems and
7 | opportunities which permit EZ Communications to own two FM
8 | stations in the same market. The FM station which they are in
9 | the process of acquiring and that they're operating under --
10 | WQKB is in the Pittsburgh market and the question is should
11 | that add -- should that be construed adversely under the
12 | diversification criteria, and our response is no, it should
13 | not because (a) the acquisition, if and when it's approved by
14 | the Commission, will obviously comport with Commission policy,
15 | but (b) will also serve the underlying premise of that policy
16 | which is to permit the, the weak sisters of the communications
17 | industry to have an infusion of, of blood from stronger media
18 | interests in the, in the community and that we are -- in fact,
19 | this is a classic case where a weak sister of the Pittsburgh
20 | media which serves as the only FM outlet for New Kensington,
21 | which is a community of some size in the Pittsburgh area, is
22 | being permitted to remain in business and improve and enhance
23 | its service because of the very reason of its combination with
24 | EZ Communications. And that we want to be able to show those
25 | factors which we believe show compliance with the Commission's

1 policies and furtherance of its policy objectives in this
2 brief statement, which we can. Obviously he will be in a
3 position to withstand cross-examination on any of the points
4 including the technical points. Then obviously to the extent
5 Mr. Berfield challenges the accuracy of any statement here, he
6 is in a position to submit rebuttal information, rebuttal
7 evidence. And that's the purpose, Your Honor.

8 JUDGE LUTON: I understand the diversification
9 point. I'm not sure I understand the rescue of a weak sister
10 assertion, so -- some component of the diversification
11 criteria. Could you explain that to me again, please?

12 MR. KRAUS: Yes. The Commission's theory, as I
13 understand it, in permitting consolidation to a limited extent
14 of facilities in the same market is reserve and enhance
15 competition and clearly where you have a station which has
16 been a very weak competitor in the Pittsburgh market in the
17 past combining with a station which has been a stronger
18 competitor, you give an opportunity to the licensee to serve
19 the market not only with both stations, but to continue and
20 enhance the service provided to New Kensington by WQKB. And
21 it is the fact that the station follows -- the history of the
22 station follows the kind of -- or demonstrates the kind of
23 weakness because the Commission was concerned about when it
24 permitted consolidation that we think shows that this is the
25 kind of consolidation the Commission is interested in

1 furthering.

2 JUDGE LUTON: Well, what does that gain BZZ if
3 you're able to show all of that? What does it gain you in
4 this renewal proceeding?

5 MR. KRAUS: Well, clearly to some extent having a
6 second FM station in the same market can't be a positive. It
7 has to be considered in some fashion as arguably a negative.
8 Our position is that it is not a negative.

9 JUDGE LUTON: That's your first --

10 MR. KRAUS: You have to weigh the benefits that are
11 gained from the duopoly against the detriments.

12 JUDGE LUTON: Well, let's not talk negatives and
13 positives. Let's talk diversification. You started out by
14 saying that your effort was to show that BZZ's acquisition of
15 this second station would not -- or should not be held against
16 it, should not be viewed adversely, because, as I remember the
17 argument, the station would not want to follow the multiple
18 ownership rules or the licensee would not want to follow the
19 multiple ownership rules.

20 MR. KRAUS: Right.

21 JUDGE LUTON: Is that right? Okay. And now, now
22 you're talking negatives and positives. Are you talking the
23 same thing?

24 MR. KRAUS: I think so, Your Honor. Not only do we
25 comply with the multiple ownership rules, but a purpose -- I

1 mean, the fact that you comply with the multiple ownership
2 rules doesn't prevent the station from being counted against
3 you in this kind of proceeding at all. And the fact that we
4 have a station -- we're authorized to have WBZZ, but that's
5 going to count against us arguably. We're authorized to have
6 a group of stations around the country, but that's going to
7 help us. It's going to hurt us.

8 JUDGE LUTON: Well, does this mean then that the
9 fact that you may be able to show that your acquisition of the
10 station would leave you in compliance with the multiple
11 ownership rules is irrelevant?

12 MR. KRAUS: No. What we're trying to show is that,
13 that our acquisition of this second station in Pittsburgh,
14 even though it would appear to give us more remedial interest
15 in Pittsburgh and, in fact does, also serves positive
16 community benefits.

17 JUDGE LUTON: Because it's offset by the rescue of
18 the weak sister argument?

19 MR. KRAUS: Yes, in part, in part.

20 JUDGE LUTON: Is that it?

21 MR. KRAUS: That is in part it.

22 JUDGE LUTON: What's the other part?

23 MR. MILLER: Your Honor, can I put in my two cents
24 worth briefly?

25 JUDGE LUTON: Okay.

1 MR. MILLER: When the Commission decided to change
2 its multiple ownership rules, it obviously -- and permit a
3 given entity to have up to four stations in the market in some
4 cases, obviously it considered that this would impact
5 adversely on, on diversity, but it went ahead and did it
6 because the adverse impact on diversity was not only
7 counterbalanced, but outweighed by the benefits the Commission
8 was attempting to achieve. Now, at some point in this
9 proceeding you're going to be asked to determine how much
10 weight you should give in doing the calculus involved in
11 deciding who wins to the fact that BZZ has a second FM in the
12 market. And it's our contention that you, in weighing the
13 diversity element there, you should do pretty much what the
14 Commission did in deciding to permit it and look at the
15 counterbalancing benefits.

16 JUDGE LUTON: Has this argument ever found its way
17 into an adjudicated case?

18 MR. ZAUNER: No. It's the first example you've had
19 of this kind of situation.

20 MR. MILLER: And for that reason, Your Honor, I --
21 it seems prudent to let it in and allow us to develop the law
22 in our proposed findings. To exclude it now --

23 JUDGE LUTON: And ask me to make some policy?

24 MR. MILLER: Well, either make some policy or not
25 make some policy and perhaps allow the Review Board to think

1 about it and the Commission to think about it. But if it's
2 excluded now and the Review Board or the Commission later
3 decides that it should have been considered, then the record
4 is deficient. If you let it in, no matter which way you go
5 there is at least a predicate.

6 JUDGE LUTON: The record won't be deficient if I ask
7 on the basis of a law that currently exists. If it changes so
8 that the record is deficient, it's not deficient in any sense
9 that really bothers me. Mr. Berfield, what do you think of
10 the, the diversity argument -- diversification argument that
11 you heard with respect to the admission of this exhibit? I
12 noticed that was not one of your objections.

13 MR. BERFIELD: Well, obviously if they have a second
14 station in Pittsburgh, that -- we take cognizance of that. I
15 will, I will say I think they're correct that there's a -- is
16 a case of first instance. I will note I wouldn't agree as a
17 legal matter that the Commission's policy was premised on a
18 weak sister being acquired. It could work the other way
19 around. Somebody with a 2 share can buy someone with an 18
20 share.

21 MR. KRAUS: That's exactly the point.

22 MR. BERFIELD: So it doesn't -- it's not, it's not
23 -- that's not necessarily the Commission's motivation on it.
24 However, I'm also sensitive. I'd like the licensee to have --
25 just as I hope we have an opportunity to prove our case, I'd

1 | like to see them have their opportunity to prove their case.
2 | I would have no objection with receipt of the exhibit and
3 | we'll argue out these legal questions on, on findings.

4 | JUDGE LUTON: Including the competence of Mr. Meyer?

5 | MR. BERFIELD: But I would ask, I would ask for some
6 | engineering information and some financial information between
7 | now and the time that Mr. Box appears so that I can do some
8 | meaningful cross-examination. We had no notice that the
9 | financial well being or failure of this other station was an
10 | issue here, but if I had, if I had some engineering
11 | information I could review and, and some financial issue
12 | information I can review before we meet again in a couple of
13 | weeks, then I would be -- I'd be happy to proceed on cross-
14 | examination.

15 | JUDGE LUTON: All right. You mean something to back
16 | up the assertion --

17 | MR. BERFIELD: That's correct. That's correct.

18 | JUDGE LUTON: -- concerning the poor financial
19 | health of --

20 | MR. BERFIELD: Exactly.

21 | JUDGE LUTON: -- the station about to be acquired
22 | and the engineering assertions made by Mr. Meyer --

23 | MR. BERFIELD: That's right.

24 | JUDGE LUTON: -- to indicate that he knows what he's
25 | talking about? Is that right?

1 MR. BERFIELD: That's right, something we could put
2 in the record and evaluate.

3 JUDGE LUTON: Yeah. I'm sorry, Mr. Box.

4 MR. BERFIELD: Something we can, we can evaluate.

5 JUDGE LUTON: All right. There's a request to the
6 licensee and can you, will you or not?

7 MR. MILLER: Sure.

8 JUDGE LUTON: I don't require it.

9 MR. MILLER: We will do our best.

10 JUDGE LUTON: All right. You'll make an effort.

11 MR. MILLER: I would note that in our integration
12 statement we did refer to exactly what this exhibit does.

13 MR. BERFIELD: But that's certainly responsive --

14 MR. KRAUS: The answer is certainly we'll provide
15 some backup financial and technical information at the
16 earliest convenient time.

17 MR. BERFIELD: And this is -- everybody reserving
18 their position as to what the final legal impact of it will
19 be?

20 JUDGE LUTON: Of course. Mr. Zauner, I haven't
21 heard from you. Do you wish to add anything?

22 MR. ZAUNER: No, Your Honor. We don't participate
23 in the comparative aspect of the case and this seems to go
24 directly to that.

25 JUDGE LUTON: It does. Now, Mr. Berfield, where

1 | does this leave me in terms of a ruling on this thing?

2 | MR. BERFIELD: Well, Your Honor, it would be
3 | perfectly okay with me if you, if you want to receive the
4 | evidence, receive the exhibit, subject, of course, to the
5 | furnishing of the information they said they would volunteer
6 | and the cross-examination. If it turns out that we're not --
7 | that in cross-examination that I can prove to you that maybe
8 | these facts aren't quite what they appear to be, you know,
9 | there's always motions to strike.

10 | JUDGE LUTON: Then we might get a different ruling,
11 | a new motion and a different ruling. All right.
12 | Diversification, no question. There is some question about --
13 | in my mind, about whether the so-called furtherance of the
14 | rationale of the diversification policy is involved here and
15 | that it -- if it is determined to, it might lessen the
16 | diversification impact that the acquisition of another station
17 | from the licensee may have. I don't know about that, but I
18 | don't have to know about it at the present time. I'll permit
19 | the parties to make arguments about it and rule somewhere
20 | along the line I'm sure. For purposes of admissibility I'm
21 | going to receive the statement of Mr. Box. That's BZZ Exhibit
22 | No. 11. The statement is received.

23 | (The document that was previously
24 | marked as EX Exhibit No. 11 was
25 | received into evidence.)

1 JUDGE LUTON: And that's the last of the exhibits
2 that are on the list and that are in the book for BZZ. Is
3 there anything else to be offered by BZZ?

4 MR. MILLER: Not at this time.

5 JUDGE LUTON: Not at this time. All right. Then
6 we've got Allegheny's exhibits.

7 MR. BERFIELD: Your Honor, can we take a short
8 break? Would that be permissible?

9 JUDGE LUTON: Sure.

10 (Off the record.)

11 JUDGE LUTON: Allegheny?

12 MR. BERFIELD: Yes, Your Honor. I've given the
13 reporter a original and one copy of our exhibits and I'd just
14 like to briefly go through and identify them all at this time.
15 Exhibit No. 1, the applicant declaration of Herbert E. Long,
16 Jr., is a four page document consisting of the covering page
17 and a three page declaration, and ask that be marked as
18 Allegheny Exhibit 1. Allegheny 2 is -- would be the
19 declaration of Herbert E. Long, III. It's a three page
20 exhibit consisting of the covering page and a two page
21 declaration. Ask that be marked as Allegheny 2. The third is
22 a decision, arbitration decision, dated November 16, 1988.
23 It's an 18 page document consisting of the covering page and
24 the 17 page arbitration decision. Ask that be marked as
25 Allegheny 3. No. 4 is an opinion dated October 16, 1989, U.S.

1 District Court, Western District of Pennsylvania involving EZ
2 Communications. It's an 8 page exhibit consisting of the
3 covering page, 6 page opinion by the judge and a one page
4 order. That will be Allegheny 4. Allegheny 5 would consist
5 of complaint letters filed with the FCC concerning WBZZ during
6 the license term. That is a 15 page document consisting of a
7 cover page and 14 pages of letters to the Commission.

8 MR. KRAUS: For clarification, did you mean to say
9 that these had been filed with the FCC or, or found in our --
10 in the station's public files because I think the, the
11 statement they were filed with the Commission is wrong.

12 MR. BERFIELD: Well, I notice that a number of them
13 have FCC stamps on them and, and they were addressed to the
14 Commission, I believe.

15 MR. KRAUS: No. In most cases they were not.

16 MR. MILLER: Not all of them.

17 MR. BERFIELD: Well, or the copies were sent to the
18 Commission.

19 MR. KRAUS: Well, that's hardly filing.

20 MR. BERFIELD: Well, certainly the first -- well, I
21 guess we can go through that, but -- when it comes times for
22 objections but, anyway, that would be our Exhibit No. 5.

23 JUDGE LUTON: All right and for now the claim is
24 that these letters were filed just as the exhibit says, filed
25 with the FCC?

1 MR. BERFIELD: That's correct.

2 JUDGE LUTON: All right.

3 MR. BERFIELD: Exhibit 6 is a letter from the
4 General Manager of the station, WBZZ, in response to various
5 letters that were addressed to the station. Exhibit 6
6 consists of a, a cover page, a one page letter from the
7 General Manager of the station, a one page list of the
8 addressees of this letter and 20 pages of letters to which he
9 responded. That would be Allegheny No. 6. Allegheny No, 7 is
10 a declaration of Duane A. Darkins and it's a three page
11 exhibit, consists of a cover page, a one page declaration and
12 a one page attachment to the declaration. That would be
13 Allegheny 7. Allegheny 8, declaration of Anne McLemore. It's
14 a three page exhibit, cover page, one page declaration and a
15 one page attachment to the declaration. That would be
16 Allegheny No. 8. Allegheny No. 9, the declaration of Robert
17 L. Pitts, a seven page document consisting of the cover page,
18 one page declaration and a five page attachment. Allegheny
19 Exhibit No. 10 is a four page exhibit consisting of a covering
20 page, a one page letter from Mr. Meyer, the General Manager of
21 the station, and a two page letter to which Mr. Meyer is
22 responding and that -- the total of that would be Exhibit No.
23 10. Exhibit No. 11 is a letter of Liz Randolph addressed to
24 the Commission dated April 27, 1989 and the Commission's
25 response from Mr. Wolfe of the Commission. The Exhibit 11

1 consists of six pages. It would be a cover page; the Randolph
2 letter is three pages and the Wolfe letter is two pages.
3 Allegheny 12, it's the declaration of Lewis I. Cohen, that
4 seven page document consisting of a declaration -- the cover
5 page and a six page declaration. And the final Allegheny
6 exhibit is No. 13, declaration Lois McDonald, two page
7 exhibit, a cover page and one page declaration. That would be
8 our Exhibit 13.

9 JUDGE LUTON: All right. Allegheny Exhibits 1
10 through 13 are marked for identification.

11 (The documents that were referred to
12 as Allegheny Exhibits No. 1 through
13 13 were marked for identification.)

14 MR. BERFIELD: At this time then, Your Honor, I
15 would like to move into admission Allegheny Exhibit No. 1.

16 JUDGE LUTON: 1 is offered. That's the declaration
17 of Herbert Long, Jr. Any objection?

18 MR. MILLER: Your Honor, this is the same objection
19 that was made to the Arthur Kellar exhibit which is we assume
20 this is not being offered in support of the -- that you get
21 credit for less than 20 hours and I -- it's not really an
22 objection. It's just a comment that we are --

23 JUDGE LUTON: All right. Even if -- no matter what
24 the purpose of the offering, if it doesn't count, it simply
25 doesn't count.

1 MR. MILLER: Yes. Whatever the ruling is for us, we
2 assume the ruling would be the same for them.

3 JUDGE LUTON: Okay. It would be the same, whatever
4 it was. Objection -- no objection. Whatever it was, it's
5 overruled. 1 is received.

6 (The document that was previously
7 marked for identification as
8 Allegheny Exhibit No. 1 was received
9 into evidence.)

10 JUDGE LUTON: No. 2?

11 MR. BERFIELD: I move into admission Allegheny
12 Exhibit No. 2.

13 JUDGE LUTON: Objections to 2?

14 MR. MILLER: No objection, Your Honor.

15 JUDGE LUTON: 2's received.

16 (The document that was previously
17 marked for identification as
18 Allegheny Exhibit No. 2 was received
19 into evidence.)

20 JUDGE LUTON: 3, the arbitrator's decision?

21 MR. BERFIELD: Well, Your Honor, I'd like to move
22 now, if I could skip around a little bit to 7, 8, 9 and 13.

23 JUDGE LUTON: All right. I'm sorry. Presumptuous
24 there.

25 MR. BERFIELD: Well --

1 JUDGE LUTON: Consider No. 7.

2 MR. BERFIELD: Okay. I move into admission the
3 déclaration of Duane A. Darkins, Exhibit No. 7.

4 MR. MILLER: Your Honor, I don't quite understand
5 why we're jumping around, but paragraph 2 of this deals with
6 the subject matter of Exhibits 2, 3 to some extent -- I'm
7 sorry, 3, 4, to some extent 5 and 6, all of which has to do
8 with the -- what we can, I guess for shorthand purposes, refer
9 to as the Liz Randolph matter. Allegheny attempted to get the
10 Commission to specify a number of issues, all evolving from
11 the matter. The Commission declined to do so. Your Honor
12 refused to ask that the Hearing Designation Order be
13 certified. The Liz Randolph matter deals with the non -- with
14 the entertainment programming, I'm sorry, of the station, has
15 no pertinence that we can divine to any aspect of this case.
16 Now, paragraph 2 of Bishop Darkins statement deals with that
17 and we would object to it on that ground, but I would -- it
18 seems that if we're going to jump to Exhibit 7 which deals
19 with matters that aren't going to have to be considered in
20 relation to any number of preceding exhibits, we should do so
21 in some coherent fashion. I will also object to the paragraph
22 1. It says, "Attached hereto is a statement listing my
23 background and qualifications." The statement is highly self-
24 laudatory. "Bishop Darkins is known and respected worldwide
25 for his sensitivity and dedication to empower mankind. It has

1 | been said that if you need a friend, call Duane Darkins. His
2 | door is never closed. His council office wall, decorated with
3 | plaques and trophies, reflects how much he has given." It's
4 | widely self-serving. At the first paragraph it just says here
5 | it's a statement. It doesn't even say it's true. As to
6 | paragraph 3, it's highly conclusory. He wants to voice his
7 | disapproval as to the station's lack of outreach to the
8 | African/American community and to the disadvantaged. Bishop
9 | Darkins is not -- I don't know whether he's being offered as
10 | an expert and capable of stating conclusions or, or what. So
11 | we object to the whole thing, but I would renew my sense of
12 | disorder at, at taking this before we deal with Exhibits 3, 4,
13 | 5 and 6.

14 | MR. KRAUS: May I respond, Your Honor?

15 | JUDGE LUTON: Yes.

16 | MR. KRAUS: Or does the Bureau have anything?

17 | MR. ZAUNER: The Bureau would agree insofar as
18 | paragraph 2 is concerned. This appears to go to the station's
19 | entertainment programming and not to its public affairs
20 | programming. With regard to paragraph 3, there seems to be, I
21 | guess, some basis for paragraph 3 insofar as it goes to the
22 | reputation of the, the station in the, in the community, but
23 | we would object certainly to paragraph 2.

24 | MR. MILLER: Your Honor, it doesn't even say he's
25 | ever listened to the station.

1 JUDGE LUTON: Mr. Berfield?

2 MR. BERFIELD: May I respond?

3 JUDGE LUTON: Yes. Several points have been made.
4 I don't know if you can remember them all. I can't.

5 MR. BERFIELD: So they have. Well, I'm sure we'll
6 go back and forth. Well, Bishop Darkins, in addition to being
7 a Bishop is a member of the City Council of Pittsburgh, and he
8 has a distinguished record which is set forth in his own --
9 which he prepared his statement of biographical
10 qualifications. He's been in various governmental positions
11 in Pittsburgh so I think he's certainly well qualified. He's
12 offered as a, as a -- not as an expert, but as a community
13 witness, and if you go through their community witness
14 exhibits, you'll see a lot of conclusionary and laudatory
15 language and that, I think, is indigenous to these kinds of
16 exhibits. I would say that with respect to the paragraph 2 in
17 the Liz Randolph matter that we have offered in -- we have and
18 intend to offer at the appropriate time the exhibits relating
19 to the arbitration decision on, on Ms. Randolph and it seems
20 to me that the relevance of that is that -- what the
21 Commission denied initially was our request for disqualifying
22 issues and we have an appeal on that and we're not now talking
23 disqualifying issues. We're talking standard comparative and
24 we're talking particularly renewal expectancy, and refer to
25 earlier today a long eloquent statement by counsel for the

1 | licensee as to how they're going to assert rules compliance
2 | and including rules compliance with EEO. And we intend to
3 | offer as counterpoint to that, among other things, the Liz
4 | Randolph matter and I would point out that there has been a
5 | recent Commission --

6 | JUDGE LUTON: GAF?

7 | MR. BERFIELD: -- GAF Broadcasting, in which the
8 | Commission made clear -- well, let me put it this way. The
9 | Commission acknowledged that there might have been some
10 | ambiguity as to whether you, you need special issues to get
11 | into certain matters in a comparative renewal and they make
12 | it, they make it clear that you can go into certain matters
13 | and, in fact, in GAF they were discussing EEO -- the EEO issue
14 | upon, you know, an appropriate showing by the challenger or
15 | some other party and that you do not need a special issue
16 | since you're then -- we're now in the context of the renewal
17 | expectancy, adherence to rules, including EEO. And I did not
18 | mean to skip exhibits for any reason other than I thought that
19 | these community witness things would be more, more a part of
20 | our direct case along with our two exhibits that have already
21 | been offered. These other exhibits that we've submitted, I
22 | think, will largely be the principle used in cross-examination
23 | of the various principles of WBZZ. They will be offered in
24 | evidence. We included them in our exhibit package so that we
25 | could be up front with everyone as to what document were going

1 to be, were going to be offered, but certainly they will be,
2 they will be used in cross-examination. Getting back to this
3 exhibit, I think certainly a member -- they produced one of
4 their exhibits by a City Councilman in Pittsburgh who was
5 laudatory of the station and I think it's only fair that we be
6 entitled to present our City Councilman, Mr. Darkins, and to
7 the extent they have any questions as to his qualifications or
8 any -- or his competence to make these statements or on what
9 basis he made these statements, well, they'll have an
10 opportunity to do so on cross-examination.

11 JUDGE LUTON: Is Darkins concerning himself with
12 entertainment programming in this Exhibit No. 7?

13 MR. BERFIELD: I don't -- well, I don't think it was
14 entertainment programming. I mean, the person involved was a
15 newscaster and it also --

16 JUDGE LUTON: That wasn't -- no. That wasn't the
17 only people involved.

18 MR. BERFIELD: No, no. The other two involved I
19 believe were, were air personalities. No. I think he was
20 involving himself with that, that situation and the -- what he
21 regarded as -- also as offensive language in programming.

22 JUDGE LUTON: What about the request -- I don't know
23 whether it really speaks to a problem or not, but it was
24 characterized as somehow now coherent, the approach that's
25 being taken here to get to the Liz Randolph matter before we

1 get to the arbitrator's decision and the court decision. I
2 think that's what you had in mind, Mr. Miller? You wanted to
3 deal with all of that first or, or just what did you want you
4 have in mind? I'm not sure. You didn't tell us really. You
5 just said it wasn't coherent.

6 MR. MILLER: Yes, sir. Well, the Liz Randolph
7 matter is somewhat -- it's certainly implicated in Bishop
8 Darkin's statement, but it's somewhat tangential to it. We
9 arrive in Allegheny Exhibit 3 at a direct confrontation where
10 the issue, I think, should be joined or whether this stuff is
11 pertinent here or not. Now, I don't -- you know, we can make
12 the arguments looking at Exhibit 7 or looking at Exhibit 3,
13 but basically I understand GAF Broadcasting and I understand
14 that if there is an EEO violation that is, that is cognizable.
15 What the Commission said there was to the extent that there
16 may be ambiguity about our policy, which we wish to emphasize
17 that at comparative renewal proceedings allegations involving
18 a licensee's violation of the Act, rules or policies can be
19 relevant. And, and that it would appear that alleged
20 violations of the Commission's EEO rules, for example, if they
21 raise a prima facie question about compliance with the rules,
22 might be pertinent to the ALJ's determination of GAF's
23 entitlement to a renewal expectancy even if no qualifying EEO
24 issue were designated against GAF. Here, however, EEO issues
25 were asked for and the Commission in the -- or the -- in the

1 Hearing Designation Order says there were no EEO violations.
2 This is the same material that was presented in order to get
3 the Designation Order to specify an EEO issue. So I think, I
4 think we have a ruling on whether there's been an EEO
5 violation here and it's on appeal. Your Honor refused to
6 certify it. I don't see how we're helping the record here and
7 I think we're opening up a whole big can of worms if we get
8 into this. Moreover, we, EZ, is under a court order not to
9 talk about a lot of this stuff. I'm not sure how we proceed
10 in defending our position. If this comes in despite it's lack
11 of relevance and lack of materiality, we've got to defend
12 against it and we are somewhat inhibited by this court order.

13 JUDGE LUTON: What exhibit are we considering here?

14 MR. MILLER: I think we're at Exhibit --

15 JUDGE LUTON: 7, 3, 4?

16 MR. MILLER: Well, it's all one ball of wax, Your
17 Honor.

18 JUDGE LUTON: We're going to have to do them one at
19 a time. I'm sorry.

20 MR. BERFIELD: Your Honor?

21 JUDGE LUTON: Yes.

22 MR. BERFIELD: Your Honor, if -- I have no need to
23 complicate matters. If it would, if it would help at least in
24 the resolution, I'll withhold offering 7 and go to 3 and 4 at
25 this time.